In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-14

ROBERT JAY CARLTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was charged, together with Errol Resnick, John Simpson and John Davis, with melting silver coins of the United States, in violation of 31 U.S.C. 395 and 31 C.F.R. (1969 Rev.) 82, and with conspiracy to commit that offense in violation of 18 U.S.C. 371. After a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on the conspiracy charge, Resnick was convicted on both charges and Davis and Simpson

were convicted on the substantive charge. Petitioner was sentenced to two years' imprisonment. The court of appeals reversed the convictions of Resnick, Simpson and Davis on Fourth Amendment grounds but affirmed that of petitioner (Pet. App. 1a-17a).

Prior to trial, petitioner and his co-defendants filed motions to suppress certain evidence contending that it was the product of a number of allegedly illegal searches and seizures, three near Orlando, Florida, one at Teterboro Airport in New Jersey, and another at Kennedy Airport in New York. The district court, following an evidentiary hearing, denied the motions on the merits, and the evidence was subsequently introduced at trial. The court of appeals found that the Teterboro Airport and Kennedy Airport searches and seizures were lawful (Pet. App. 14a-15a), but concluded that at least the second and third searches near Orlando were unlawful (Pet. App. 12a). The court reversed the convictions of Resnick, Simpson and Davis, but affirmed petitioner's conviction on the ground that the record showed that he, unlike his co-defendants, lacked standing to challenge the legality of the searches and seizures near Orlando (Pet. App. 13a).

The pertinent facts are set forth in the opinion below on which we principally rely. We add only the following discussion dealing specifically with petitioner's claim in this Court.

1. Petitioner contends (Pet. 6-9) that he did not voluntarily consent to the Teterboro Airport search. This contention is without merit. The record shows

that on March 13, 1969, at approximately 2:00 p.m., Resnick's DC-3 aircraft landed at Teterboro Airport (H. Tr. II 44-45).[1] Aboard the aircraft were petitioner, the pilot, a friend of the pilot, and another employee of Resnick (H. Tr. I 104). The aircraft was immediately impounded by airport security police and those aboard the aircraft were taken to a conference room to wait for secret service agents (H. Tr. I 103).

Secret Service Agent Paraschos testified at the suppression hearing that he arrived at the conference room sometime between 3:30 and 4:00 p.m. on March 13, 1969 (H. Tr. I 102). He immediately identified himself as a special agent of the United States Secret Service, showed his credentials and asked those in the room to identify themselves (H. Tr. I 103). Petitioner identified himself as a representative of Resnick and as the individual responsible for the aircraft and its cargo (H. Tr. I 104). Agent Paraschos then asked the pilot and petitioner the nature of the cargo; they both said it was coins (H. Tr. I 105). Agent Paraschos testified that at this point he asked petitioner and the pilot for permission to board the aircraft to confirm the cargo, advising them "that they could decline and it was in their rights to deny this and that they did not have to allow either [himself] or any other agent or representative of the government to do this" (H. Tr. I 105, 118). He also testi-

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[1] "H. Tr." followed by volume number refers to the two volume transcript of the suppression hearing which we are lodging with the Clerk of this Court. "Tr." refers to the trial transcript which we are also lodging with the Clerk of this Court.

fied that no inducement, force or promises were made to the pilot or petitioner to gain their permission to search the aircraft and that both the pilot and petitioners gave their permission (H. Tr. I 106).

Secret Service Agent Scott testified that he also specifically asked petitioner's permission to go aboard the aircraft, and that petitioner gave his oral permission (H. Tr. I 145). Petitioner and the pilot testified that they did not give anyone permission to board the aircraft (H. Tr. II 53, 74).

Petitioner now asserts that he did consent to the search, but that his consent was not voluntary since it was not shown that he knew of his right to refuse (Pet. 7). As the record shows, however, petitioner was specifically told by a Secret Service agent prior to the search that he had the right to refuse permission (H. Tr. I 105, 118). The district court was thus justified in its determination that petitioner had knowingly and voluntarily consented to the search. In view of the explicit advice given by the agent as to petitioner's right to refuse consent, this case does not present the issue posed in *Bustamonte* v. *Schneckloth*, 448 F.2d 699 (C.A. 9), certiorari granted, 405 U.S. 953, and there is no reason to hold this case pending the outcome of *Bustamonte*.

2. Petitioner contends (Pet. 9-11) that he had standing to challenge the legality of the searches and seizures near Orlando, Florida.[2] However, the court

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[2] Petitioner also objects that his standing was not questioned in the district court. However, if that court was correct in admitting the evidence against petitioner, the fact that its rea-

of appeals below properly concluded (Pet. App. 13a) that petitioner lacked standing, and this issue warrants no further review.

The relevant facts, which are set forth in the opinion below (Pet. App. 2a-8a), show that the searches and seizures in question occurred on a 20 acre tract of densely wooded land located ten to twelve miles from Orlando.

During the afternoon of March 12, 1969, Secret Service agents, without a warrant, entered the fenced tract and from a distance observed the garage-like structure located inside the tract for approximately 45 minutes. They saw what appeared to be a reflection of fire on the inside walls of the structure and were able to hear voices, loud banging, and a roar which they identified as that of a blast furnace. The second search occurred that evening when the agents entered the tract, without a warrant, and looked through a hole in the roof of the unoccupied structure. They observed an overhead crane and the frame supporting it, a workbench, a fan, and what appeared to be the rim of a blast furnace or melting pot at the edge of a pit in the floor. The third warrantless search occurred the following day at about 10:20 a.m. when Secret Service agents entered the tract and placed the structure under surveillance. At about 11:45 a.m. the site was raided, resulting in the arrest of Simpson and Davis and the seizure

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soning may have been erroneous does not justify reversal of its judgment. See, *e.g.*, *United States* v. *Bacall*, 443 F. 2d 1050 (C.A. 9), certiorari denied, 404 U.S. 1004.

of various items of equipment used in the smelting operation together with bags of United States coins.

Resnick testified that the smelting business was his and that he received the profits (Tr. 1414, 1419). He also testified that he and his wife owned the smelting site (Tr. 374, 1366), and that petitioner was a salaried employee (Tr. 1410, 1412). Petitioner also testified that he was a salaried employee of Resnick (H. Tr. II 97-98; Tr. 1616). Resnick further testified that the coins melted at the site were his and that he had paid for the smelting equipment and copper (Tr. 1409, 1421, 1438; see Tr. 421).

Petitioner testified that he was uncertain whether he had been at the smelting site at any time during the day of March 12, 1969, the day of the first two searches near Orlando (Tr. 1606). When the second search was conducted on the evening of March 12, 1969, the building was unoccupied (H. Tr. I 66-67). Petitioner also testified that at about 8:00 a.m. on March 13, 1969, he departed from Herndon Airport aboard Resnick's aircraft, arriving at Teterboro Airport in New Jersey sometime around 2:00 p.m. (H. Tr. II 72, 88). He did not leave Teterboro Airport until sometime after 8:30 p.m. (H. Tr. II 96) and therefore could not have been present at the smelting site at the time of the third Orlando search.

Thus, unlike *Combs* v. *United States*, No. 71-517, decided June 26, 1972, where the record was virtually barren of facts necessary to determine the issue of standing and this Court remanded the case to the district court for an evidentiary hearing, the

court of appeals here had a basis in the record for concluding that petitioner lacked standing to challenge the legality of the searches and seizures at the smelting site. He was unable to establish his presence at the smelting site when the searches or seizures occurred and he had no interest in the site or in the property subjected to the searches and seizures. See *Jones* v. *United States*, 362 U.S. 257.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1972.

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[3] Following the decision below petitioner filed a petition for rehearing in which he appended affidavits of himself and Resnick claiming that petitioner had a thirty percent interest in the business operations conducted at the smelting site and had provided $5,000 for the purchase of supplies, equipment and improvements to the location. This claim, however, is in direct conflict with the testimony petitioner and Resnick gave at the suppression hearing and at trial. Petitioner's affidavit did not assert that he was at the smelting site at the time of the searches but only that he had been there one month earlier. The court of appeals denied petitioner's rehearing petition without opinion (Pet. App. 18a).

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